Docket: 2017-201(IT)I

BETWEEN:

118682 CANADA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 6, 2018, in Montreal, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Representative of the Appellant:	Mario Poupart
Counsel for the Respondent:	Mr. Ryan Allen

JUDGMENT

The appeal from the assessment under the *Excise Tax Act* the notice of which is dated September 18, 2015, for the periods between August 1, 2011 and December 31, 2014, and from the assessment for which the notice is dated January 12, 2016, and covering the periods between January 1, 2015 and September 30, 2015, is dismissed, without costs, as per the attached reasons for judgement.

Signed at Ottawa, Canada, this 14th day of November 2018.

"Alain Tardif"

Justice Tardif

Citation: 2018 TCC 227
Date: 20181114
Docket: 2017-201(GST)I

BETWEEN:

118682 CANADA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGEMENT

Tardif J.

[1] To explain and justify the basis for the assessments, the Respondent took the following for granted, more fully described at paragraph 26 of the Response to the Notice of Appeal, and reading as follows:

a) During the reporting period, the Appellant was a registrant for the purpose of Part IX of the ETA;

b) The Appellant operates a restaurant under the name Restaurant Au Coin du Hot-Dog/Mario Pizza;

c) The Appellant has the sales recording module (hereinafter "SRM") required under Quebec tax legislation;

d) All supplies made by the Appellant as part of its company's commercial activities during the reporting period were taxable supplies for which a tax, namely the GST, at the rate of 5% on the value of the consideration for the supply payable by purchasers to the Appellant, which was required to collect it;

e) The Minister conducted a tax audit under the ETA;

f) Further to the analysis of the documents and data provided by the Appellant, the Minister found anomalies and discrepancies between the accounting records, financial statements, periodic sales summary ("SPV") reports generated by the SRM, and the GST/ITC returns, including:

ITCs denied

	2013	2012	2011	Total
Eligible ITCs (E/F)	$6,699.81	$4,598.22	$1,686.29	
GST/ITC returns	$9,170.95	$6,204.06	$2,312.87	
Discrepancy assessed	$2,471.14	$1,605.84	$626.58	$4,703.56

Audit Methodology

g) In the above table, the "Eligible ITCs" were calculated based on the financial statements provided by the Appellant. The auditor assumed that they reflected reality and awarded ITCs on all expenditure items usually subject to GST (electricity, telephone, professional fees, etc.). Regarding the Cost of Goods Sold ("COGS") item, the auditor awarded ITCs on 10% of the COGS, despite the fact that it was essentially food that is usually zero-rated;

h) Awarding ITCs on 10% of the COGS benefits the Appellant because there is no ITC for zero-rated purchases;

i) The audit was closed with the information available as of July 20, 2015, since the Appellant had agreed to sell its property and since figures were to be provided to the notary upon the sale set for August 10, 2015;

j) The fact of having closed the audit was not detrimental to the Appellant because the amounts assessed were the minimum amounts (based mainly on the presumption of eligibility of all the ITCs claimed (as described at paragraph 26 h) above; whereas a more in-depth audit would have revealed double-claimed amounts, personal expenditures claimed, etc., as discovered during the objection and as described below);

k) Therefore, the audit found a discrepancy of $4,703.56 between the eligible ITCs and the GST/ITC tax returns filed;

Unremitted GST

l) Regarding the unremitted GST, the following discrepancies were identified:

	2014	2013	2012	Total
SPV (from the SRM)	$19,141.15	$20,638.77	$16,839.50	
GST/ITC returns	$18,564.94	$19,281.87	$14,277.74	
Discrepancy assessed	$580.65	$1,326.90	$2,519.18	$4,499.31

Audit Methodology

m) To determine the amount of GST that the Appellant collected or was required to collect during the reporting period, the amount of taxable supplies made by the Appellant were therefore calculated for the reporting period by comparing the periodic sales summary ("SPV") reports generated by the SRM, to the GST amounts reported on the net tax returns submitted by the Appellant and by assessing the discrepancy between those figures, for an amount of $4,499.31;

n) Note that, during the audit, it was assumed that the SPV reports were accurate; whereas a more in-depth analysis of the months from May to July 2014 revealed that:

i. There are several "Z" reports missing in the cash register;

ii. Every day, there was a significant number of cancelled transactions: approximately 11% of the transactions in July 2014, 61% of the transactions in June 2014, and 10% of the transactions in May 2014;

iii. There was a large number of "void" transactions recorded;

iv. Therefore, this implies that the SPV reports do not reflect all of the sales made.

[2] The Appellant was represented by Mr. Mario Poupart, the sole shareholder in the Appellant corporation. At the outset, I indicated to him the extent of the responsibility that fell to him in the corporation's appeal that he was controlling during the periods covered by the notices of assessment.

[3] Despite the Court's explanations and observations, the Appellant constantly relied on a document prepared in advance. I then asked him if the content of the document consulted reflected the essence and the basis of his submissions in support of the appeal; he indicated that it was indeed the content of his claims in support of the Appellant's appeal.

[4] The contents of the document in question refer to a previous audit that resulted in an agreement; the Appellant submits that the current case should use same percentage as the one retained in the case in question in terms of the percentage allocated under the "error" heading.

[5] Taking it as a given that a settlement was reached in the Appellant's similar case for years prior to those that are the subject of the appeal, the Appellant maintained and reiterated that the same percentage error should apply and be attributed to the Appellant in the current case.

[6] Despite the cautions about the weight of the burden of proof, the Appellant's representative essentially argued generalities and reiterated that the losses and errors claimed were normal, legitimate, reasonable and consistent with those accepted by the Respondent in a previous audit.

[7] He explained that the errors were normal, common and caused either by customers changing their minds at the last minute or by a lack of attention due either to inexperience, incompetence or all kinds of other reasons.

[8] In its written explanations and submitted in its evidence, the Appellant describes a day's work for a cashier employee as follows:

> Using a mouse or touch screen, the employee takes the customer's order using a cash register. They click the items ordered by the client and totals them up; the employee collects from the customer right away; there is often an error in the order, which can be an error by the employee or the customer.
>
> When there is an error, the employee puts the ticket in the till, does the transaction over and gives the new bill to the customer. Tickets with errors are subtracted

> from sales at the end of the day. It is from those amounts that the sales for the day are calculated and submissions made to Revenu Québec.

[9] Those are the only explanations justifying the discrepancies between the SRM and the reported sales.

[10] On the basis of this premise and the percentage allocated in the previous case, the Appellant assumed that the Respondent's concessions would henceforth be the rule. Based on that, it had put in place a more than basic way of managing those supposed errors.

[11] By attaching a very brief note to the daily sales report in support of the errors that occurred that day, this made it impossible to analyze the circumstances and especially the relevance of the subtractions.

[12] It would have been meaningful if the note had been identified by the person responsible so that the Tribunal could better assess the credibility; and also, the individual(s) responsible could have testified. In addition, that would potentially have enabled the Appellant to undertake the appropriate corrective measures, including with managing the staff at the root of the errors.

[13] Further to a settlement reached in the previous case, the Appellant retained the concessions obtained to turn them into a *modus operandi* in managing the company; in fact, it assumed that the errors and/or losses accepted would be accepted again, in the event of another audit.

[14] The Tribunal instead believes that the Appellant took advantage of the "ERROR" strategy.

[15] The Respondent, on the other hand, showed that the Appellant's accounting did not have the reliability or suitable quality to enable a conventional audit; hence the use of the "alternative method" approach. The alternative method was chosen because of the complete inability to determine the relevance and credibility of the numerous errors recorded through incomplete notes.

[16] The Respondent initiated the audit that led to the appeal without taking into account the percentage allocated in a prior audit. The Respondent processed the case independently of any prior experience, which clearly irritated and frustrated the Appellant's representative.

[17] The Appellant maintained and reiterated that the audit that it underwent was cursory and sloppy. On the face of it, the facts and circumstances around the audit process support and validate such a perception.

[18] In fact, the evidence demonstrated that the individuals responsible for the audit had received instructions to proceed quickly because it had been brought to the revenue agency's attention that the company was about to undergo a transaction whereby there would be a change of ownership.

[19] As such, the Appellant was critical and stressed the fact that the Respondent had botched its job by not conducting a comprehensive audit of the documents that, in its view, were complete and available.

[20] The evidence made it possible to at least partially validate the Appellant's thesis. In fact, in light of the later evidence of a transfer of ownership, the audit process already under way was expedited in order for the findings to be available before the transfer of ownership.

[21] The Respondent's representatives admitted to proceeding expeditiously as per the instructions received. However, they added and explained at length that the expediting had in no way been detrimental to the Appellant; on the contrary, the Respondent argued using numerous and concrete examples that the Appellant had greatly benefited from the expedited method.

[22] As such, the evidence proved convincing, even determinative, even though the approach taken by the Respondent is questionable, even unprofessional. The sole jurisdiction of this Court is to determine whether the disputed assessment is adequate.

[23] In other words, the Tax Court of Canada must essentially evaluate the quality and fairness of the assessment. The zeal and/or debatable quality of the audit process does not automatically result in the outright cancellation of the disputed assessment.

[24] It is clear that sloppy or poor-quality work can produce an outcome of uncertain reliability; in this case, the deficiencies and weaknesses with the quality of the audit process proved quite beneficial for the Appellant.

[25] As such, they showed that the audit assigned or accepted a number of entries that were non-admissible on the surface, for which questioning would have

resulted in a higher assessment. In other words, the audit proved more cursory in that some problematic data were simply assumed as being consistent with the Appellant's claims, albeit doubtful, uncertain and unjustified.

[26] This case is also unique on a very fundamental point.

[27] In fact, the Appellant did not submit any real evidence of the merit of its appeal; its only evidence involved establishing that there were a number of perfectly normal, legitimate errors. It admitted the above errors, arguing that they were normal realities, especially since they had been accepted in a previous case in the context of an out-of-court settlement.

[28] To validate its thesis, it prepared a paper reproducing a number of passages from various decisions. The excerpts are reproduced out of context and are often very incomplete. For example, it refers to cases pertaining to losses or gratuities; however, the Appellant's claims are in no way based on losses or gratuities but on multiple errors.

[29] The sole purpose of introducing the SRM is to enable a reliable reading of the daily operations of a restaurant business. Based on an actual experience during which the Appellant had obviously done well, it wanted to repeat the exercise by subtracting sales for reasons of error, recorded using just small notes in the daily reports.

[30] Some were in accordance with the rules set out since the SRM came into effect, but most were essentially a small note with no details about the person's name, the subject and/or the circumstances.

[31] The Appellant's approach was not a one-time or isolated action; it was a routine, significant and repetitive practice.

[32] Lastly, the Appellant's claims put in writing are essentially interpretations of excerpts from various decisions that are often irrelevant. At the very end of the hearing, the Appellant would have wanted the Tribunal to factor in the multiple, disorderly documents never brought to the Respondent's attention either during the audit or at the objection stage.

[33] As for the Respondent, a clear preponderance of the evidence submitted validates and certifies the quality, truthfulness and relevance of the facts taken for granted and listed on the first pages of this judgment.

[34] The burden of proof resting with the Appellant was not met. The only evidence submitted consisted of grievances, criticisms, speculations and assumptions, without being validated by the facts.

[35] For these reasons, the appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 14th day of November 2018.

"Alain Tardif"

Justice Alain Tardif

CITATION:	2018 TCC 227
COURT FILE NO.:	2017-201(GST)I
STYLE OF CAUSE:	118682 CANADA LTD. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	June 6, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice Alain Tardif
DATE OF JUDGMENT:	November 14, 2018

APPEARANCES:

Representative of the Appellant:	Mario Poupart
Counsel for the Respondent:	Mr. Ryan Allen

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